

PUBLIC MEETING MINUTES

February 9, 2006

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95814

Chairman Duncan called the meeting to order at 10:05 a.m.

Members Present

John C. Duncan, Chairman
Alfred K. Whitehead, Member
Lilian S. Shek, Member
Sally M. McKeag, Member
Karen Neuwald, Member

Staff Present

Bob Thompson, General Counsel
Fred D'Orazio, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer
Les Chisholm, Regional Director

Call to Order

Chairman Duncan called the Board to order for the continuous open session of the December 8, 2005, Board meeting. He reported that the Board met in continuous closed session to deliberate on cases pending on the Board's docket.

Since that open session in December, the Board has issued PERB Decision Nos. 1785-H, 1786, 1787, 1788-H, 1789-H, 1790-S, 1791, 1792-H, 1793-H, 1794-H, 1795-H, 1796-H, 1797-H, 1798-H, 1799-H, 1800-H, 1801-H, 1802-H, 1803-H, 1804-H, 1805, 1806-S, 1807-M, 1808-M, 1809-M, 1810-H, 1811-H, 1812-H, 1813-H, 1814-S, 1815-S, and Administrative Appeal No. Ad-350-H. A document containing a listing of the aforementioned decisions was made available at today's meeting.

Member Shek introduced and welcomed her new Legal Adviser, Joanne Narloch, to PERB. Ms. Narloch assumed office on December 27, 2005 and her work experience was briefly reviewed by Member Shek.

Chairman Duncan announced and congratulated Irma Rosado, Executive Assistant to the Board, for her 25 years of state service. A plaque noting her 25 years of service to the State of California and a gift from the state, will also be presented to Ms. Rosado for her achievement.

Motion: Motion by Member Whitehead and seconded by Member Shek to close the December 8, 2005, public meeting.

Ayes: Duncan, Whitehead, Shek, McKeag and Neuwald.

Motion Carried.

Chairman Duncan opened the meeting of February 9, 2006 and Member Whitehead led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Neuwald and seconded by Member Shek that the Board adopt the minutes of the Public Meeting of PERB for December 8, 2005.

Ayes: Duncan, Whitehead, Shek, McKeag and Neuwald.

Motion Carried.

Comments From Public Participants

Mr. Werner Witke, employed as an agency fee payer of the University of California, San Diego representing himself, commended the Board for doing a good job in processing their cases over the past few months. He stated that PERB's agency fee regulations needed strengthening and requested that the Board review them at some point in time.

Staff Reports

Chairman Duncan reported that the second Advisory Committee meeting held on January 26, 2006 was well received by PERB constituents and staff. Chairman Duncan stated that he viewed these meetings as a long term effort toward improving PERB's efficiencies. He thanked all interested parties in attendance and stated that many valuable processes evolved as a result of specific suggestions from the past meetings. Examples included establishing an on-line status report for ALJ decisions and fact finding reports and coordinating a one-day training conference for PERB constituents. The next regularly scheduled Advisory Committee meeting will be planned for some time in May, 2006.

a. Administrative Report

Ms. Potter reported that pursuant to Control Section 3.45 of the Budget Act, PERB was notified by the Department of Finance that it was given an unallocated budget reduction of \$35,000 for fiscal year 2006-2007. The Governor's unallocated reduction plan was a 2-year plan, with this reduction being the second one. PERB's first reduction was \$86,000 for fiscal year 2005-2006. Over the past 2 years, total reductions equaled \$121,000. Reduction plans are due to the Department of Finance on March 1, 2006.

She also reported that all of PERB's regular on-going positions are filled, with the addition of Michelle Crouch, Legal Secretary in the General Counsel's Office, who began in early January of this year.

Ms. Potter also reported on the following two issues regarding PERB's computer network application:

- 1) The electronic filing of unfair practice charge application, including enhancements established as a result of requests from constituents at the most recent Advisory Committee meeting. Several constituents tried the unfair practice charge on-line filing program and PERB received very positive feedback. The application will be available for official use upon approval of the necessary regulations; and

- 2) At the request of interested parties, the report of administrative law judge's (ALJ) proposed decisions for the fiscal year and fact finding reports dating back to 2003 are displayed on the PERB website. The ALJ report will be updated once a week on Mondays and past reports for the fiscal years ending 6/30/04 and 6/30/05 will also be displayed. She indicated that fact finding reports will be added to the web site as they issue.

b. Legal Report

General Counsel Bob Thompson reported that the regional attorney and litigation reports were distributed to the Board for their review. PERB recently litigated and filed briefs in a Charter School case before the National Labor Relations Board (NLRB) and a Regional Director's decision is pending as to whether the NLRB has jurisdiction over the matter. PERB is currently processing an unfair practice charge filed by the same charter school employees.

Mr. Thompson also reported that PERB filed a complaint and an application for intervention regarding a matter in Santa Clara County. The Santa Clara County case involved a general election held in 2004 and the county's behavior in negotiations, with respect to some ballot initiatives in that election.

Mr. Thompson also reported that PERB received a letter from Wendi Ross, Labor Relations Counsel from the Department of Personnel Administration, regarding the possibility of accepting injunctive relief filings after normal business hours. Mr. Thompson stated that he prepared and distributed to the Board: 1) A copy of Ms. Ross' letter; 2) a brief summary of Ms. Ross' concerns and 3) a draft letter responding to her concerns. Mr. Thompson explained that PERB's normal business hours are set by the Government Code and if the hours were to be altered, new regulations would need to be promulgated. At present, PERB regulations are consistent with the normal business day (8:00 a.m. to 5:00 p.m., Monday through Friday, excluding State holidays and the weekends). He also added, if a request for injunctive relief or any other matter is filed

during normal business hours and there is a situation that requires immediate attention, PERB has without fail worked evenings and/or weekends to diligently provide a response so that the Board or parties may proceed accordingly. Chairman Duncan requested that Mr. Thompson investigate this matter more fully with PERB constituents and report back to the Board with further information. Mr. Thompson indicated that it is not uncommon for the General Counsel's office to receive inquiries from various lawyers indicating that they have heard rumors about situations that were about to occur, and would ask what steps were necessary to file a charge, an injunctive relief, etc.

Chief Administrative Law Judge Fred D'Orazio reported that the administrative law judge (ALJ) report was distributed to the Board for review. He reported that at the last public meeting, the Board discussed the issue of allowing PERB ALJ's to travel to onsite hearings. As a follow-up to that report, there have only been two cases consolidated into one which required PERB ALJ travel. He further reported that a PERB conference was scheduled for September 15, 2006. It is now in its planning stage, with the California Public Employee Reporter being a co-sponsor.

c. Legislative Report

Regional Director Les Chisholm reported that his legislative report was distributed to the Board for their review. At this time, there were no bills which significantly affect PERB itself and its jurisdiction. He will continue to monitor any new legislative developments and report back to the Board. He stated that he is currently monitoring Senate Bill 1041 regarding District Agricultural Associations. He will continue to monitor any new developments to this bill but it appears now it will not impact the agency.

Motion: Motion by Member Whitehead and seconded by Member Shek that the Administrative, Legal Reports (including General Counsel and Chief Administrative Law Judge) and Legislative Reports be received.

Ayes: Duncan, Whitehead, Shek, McKeag and Neuwald.

Motion Carried.

Public Hearing on Proposed Rulemaking

Chairman Duncan opened the public hearing on proposed rulemaking pursuant to Government Code section 11347. After reviewing all comments, objections and recommendations, the Board will consider the adoption, repeal and amendment of regulations as described in the Notice of Proposed Rulemaking published in the December 23, 2005, California Regulatory Notice Register. According to the notice, written comments were to be submitted by 5:00 p.m., Tuesday, February 7. Two written comments were received.

Chairman Duncan requested General Counsel Bob Thompson and Regional Director Les Chisholm give a presentation and a general overview on the proposals that adopt, amend or

repeal various sections of the Board's regulations concerning unfair practice charges, filing, service, representation petitions, unit modification petitions, and other matters.

Mr. Thompson stated that the primary focus of the proposals is to simplify, clarify, and clean up omissions to the regulations. Mr. Thompson briefly summarized each proposed regulation by category as set forth in the Notice of Rulemaking.

Chairman Duncan then opened the public hearing on proposed rulemaking to interested parties.

Mike Miller, International Representative, representing the International Union, United Automobile, Aerospace and Agricultural Workers (UAW), addressed proposed changes to Regulation 32781 concerning unit modification. Miller stated that in its initial statement of reasons, PERB indicates this proposed change is intended in part to address a situation where an exclusive representative files a unit modification petition seeking to include in its unit some or all of the unrepresented employees for which another union has filed a representation petition. While UAW agrees that PERB's proposed change to require a 30 percent showing of support for the unit modification is a good one, they believe that PERB should also make changes to the regulations making the unit modifications under this particular fact pattern fully consistent with the law regarding interventions. UAW urged that the Board also require a petition be filed within the 15 workdays of posting the notice of the representation petition and that the unit modification petition be considered an intervention and be part of the same proceeding; unless that happens, there is great potential that the subsequent process could be confusing, contradictory and, as the Board pointed out in its Arcadia case, a union and employer could do an end run around the entire PERB process by using the unit modification petition instead of intervening in a representation case.

Mr. Chisholm responded by first noting that there were three changes overall that were made with respect to the unit modification process in PERB regulations: 1) Eliminating the requirement of the use of a form; 2) clarifying when a unit modification petitioner is required to provide proof of majority support amongst the positions or classifications that they seek to add; 3) adding the requirement for 30 percent support in the case where the unit modification petition perhaps does not meet a 10 percent threshold that triggers the proof of support requirement, but the petition overlaps with a pending request for recognition or petition for certification. The choice of the word "pending" was deliberate because it is going to vary, in PERB's experience, which is filed first. The technical problems with the proposals made by UAW include the fact that there may not be a posting period with respect to the overlapping petition. UAW's focus is primarily with HEERA, where a union may file either a request for recognition and demonstrate majority support itself, or file a petition for certification, which requires only 30 percent showing for that petitioner. There is no posting requirement under HEERA for a petition for certification, and there is no intervention period with respect to a petition for certification. That is also true for the MMBA. PERB's argument would be that the proposed regulation language as submitted to the Board for the public hearing should be adopted as is, without the additional change because: 1) UAW's proposal does present some additional problems with respect to determining when the intervention period is (where there is no such thing), and 2) these are decisions best made on a case by case basis as to whether the proof of support requirement should apply.

Mr. Miller stated that the point UAW is trying to make, based on problems they have encountered in the past, is that a petitioner should not be caught in a situation where on one track you have a petition for representation moving forward in one direction in one proceeding and potentially in a different proceeding another unit modification petition moving on a different track with potentially contradictory outcomes and at the very least a great deal of confusion. Their issue is not whether there is 30 or 50 percent support required. The way the regulations are currently drafted, there is a potential problem where one union that is an exclusive representative can circumvent the intervention period by using the unit modification petition to take all or some of the workers that the union is seeking to become the exclusive representative of through filing a unit modification after the intervention period closes. Mr. Chisholm noted that under other existing regulations, that scenario can play out even if the UAW language were adopted. Mr. Chisholm stated under regulation 32166 any other employee organization can seek to become a full party to the representation hearing and would only have to produce 10 percent proof of support at that point, not the 30 percent. Mr. Chisholm further stated that none of the scenarios described by either Mr. Miller or himself happens very often.

Mr. Chisholm stated that it is PERB's normal practice, where a unit modification petition and a representation petition have some overlap, to consolidate those matters for resolution so you don't wind up in two different forums. Mr. Chisholm concluded that the potential problems with the addition of UAW's proposed language outweigh any potential benefit of it.

Regarding proposed changes to Regulation 61000, Mr. Thompson responded to written comments that were received. Mr. Thompson stated when PERB was given jurisdiction for the MMBA in 2001, there was a question about representation matters and what authority PERB would have. At that time, PERB proposed regulations provided a template, based on existing regulations for the other statutes, as a model for dealing with representation issues. In doing so, PERB couched the applicability of those regulations so that they would be applied either in a situation where the employer adopted those regulations as their own or where all parties agreed to be bound by the applicable PERB regulations. Later, the Legislature changed the MMBA to expressly confer on PERB the authority to conduct elections and to apply its rules where a local agency had not adopted representation procedures. PERB's regulations were modified to also apply in the circumstance where a local agency had no rules with respect to some specific process, such as decertification, or perhaps no representation rules at all. Under that circumstance, the rules would be available for individuals to file with PERB as they would under the other statutes that PERB administers. Under the current proposal, the regulations would be cleaned up to simply state: where there is no local rule, the PERB rule would apply. Mr. Jonathan Weissglass, representing Altshuler, Berzon, Nussbaum, Rubin & Demain and the Service Employees International Union, believes that PERB is giving up authority that it has and that the Legislature has sanctioned. However, according to Mr. Thompson, even with the proposed change, if PERB is approached by someone with a petition and in fact they have local rules that make PERB part of the process, then we would process that petition as required by the local rules. On the other hand, the present regulation that allows parties to come to PERB even where to do so conflicts with existing local rules might arguably involve PERB in conduct that itself violates the MMBA. Thus, Mr. Thompson recommended the proposed change be made to section 61000.

Motion: Motion by Member Whitehead and seconded by Member Shek to close the public hearing on proposed rulemaking.

Ayes: Duncan, Whitehead, Shek, McKeag and Neuwald.

Motion Carried.

At this time, Chairman Duncan entertained a motion to adopt the regulations as presented or to hear any other motion presented by the Board.

Motion: Motion by Member Whitehead and seconded by Member Shek that the Board adopt the proposed regulations as presented and direct the General Counsel to prepare the necessary forms to submit the approved regulations to the Office of Administrative Law.

Chairman Duncan stated that he was in support of moving the proposed regulation package forward to the Office of Administrative Law. Member Shek supported Chairman Duncan's statement.

Member McKeag indicated that she would like to take the action up at the next meeting so that she would have more time to further review the transcript of the comments made at today's meeting. She stated that she was not comfortable with signing off just yet on the proposed regulation regarding unit modification and needed more time to further review and comprehend the comments made at today's meeting.

Chairman Duncan explained that there was a motion on the table to adopt the proposed regulations as presented, but if the present motion was voted down, another motion will be entertained. Chairman Duncan proceeded with the motion by requesting Executive Assistant Chris Wong to call roll for a vote.

Ayes: Duncan, Whitehead and Shek.

Nays: McKeag.

Not Voting: Neuwald.

Motion Carried.

Old Business

None.

New Business

None.

General Discussion

There being no further business, the meeting is recessed to continuous closed session.

The Board will meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through April 6, 2006 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. code sec. 11126(c)(3)), personnel (Gov. Code sec. 11126(a)), pending litigation (Gov. Code sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code sec. 11126(e)(2)(c)).

Motion: Motion by Member McKeag and seconded by Member Whitehead that there being no further business, the meeting be recessed to continuous closed session.

Ayes: Duncan, Whitehead, Shek, McKeag and Neuwald.

Motion Carried.

Respectfully submitted,

Chris Wong, Executive Assistant

APPROVED AT THE PUBLIC MEETING OF:

John C. Duncan, Chairman